

## **SECTION 108 PROSECUTION AND PROGRESS**

### **108.01 ASSIGNMENT OR SUBLETTING OF CONTRACT.**

**108.01.1 Assignment of Contract.** Do not assign, sublet, transfer, convey, or dispose of more than 60% of any portion of the Contract cost without the written consent of the surety and the Department.

Include in the written assignment or subcontract, or in a separate written assignment with the assignment or subcontract the following language.

"In consideration of being awarded this subcontract, and in consideration of having this subcontract approved by the State of Montana, the Subcontractor hereby assigns to the State of Montana any and all claims or causes of action for any antitrust law violations, or damages arising therefrom, as to goods, materials, and services purchased under the terms of this subcontract or any change order that may result from this subcontract."

**108.01.2 Subletting.** Perform at least 40% of the Contract cost with the Contractor's organization. Designated Contract "Specialty Items" may be performed by subcontract without regard to the 40% limitation.

Where an entire item is subcontracted, the percentage of the total work subcontracted is based on the contract item bid price. When a portion of an item is subcontracted, the percentage of the work subcontracted will be based on either the subcontract item unit price or on an estimated percentage of the contract item bid price, determined by the Engineer.

Do not allow any Subcontractor to start work until its subcontract is approved by the Construction Engineer in Helena. Include three executed and certified copies of the subcontract, a letter from the surety consenting to the subcontract, and a copy of the proposed subcontractor's current special fuel users permit issued under 15-70-302, MCA.

Do not assign more than the allowable 60% by including additional labor, equipment, and supervision costs on the Contractor's payroll records to circumvent the subcontracting provisions.

Inform the subcontractor of all the Contract provisions. The minimum wage included in the Contract applies to labor performed on all work sublet, assigned, or disposed of.

Attach to each subcontract all required Contract provisions and predetermined minimum wage rates. Include in the subcontract these words: "The subcontractor agrees to comply with all of the labor provisions contained in the attached "Special Required Contract Provisions" and "Minimum Wage Determination."

All subcontractors are agents of the Contractor. The Contractor is responsible for all work, material furnished, and indebtedness incurred by the subcontractor.

Written consent to sublet or transfer the Contract does not release the Contractor from liability under the Contract and bond.

**108.02 NOTICE TO PROCEED.** Work is to begin and time charges will start on the date stipulated in the "Notice to Proceed".

If work cannot begin on the date in the Notice to Proceed due to reasons beyond the Contractor's control, these conditions, dates, and reasons will be recorded in the weekly "Assessment of Contract Time" and no time will be charged. Begin work when the Engineer determines and issues a notice to resume work and that assessment of contract time will start.

**108.03 PROSECUTION OF WORK.** Submit to the Engineer within 5 calendar days of award, 2 copies of an Activities Schedule Chart (ASC) and Written Narrative (WN) that details the time (working days or completion date) involved to complete the major contract items for the duration of the Contract. Include in the ASC:

- A. A bar chart chronologically sequenced and to time scale showing all major work items and their construction prosecution and preparation activities;
- B. Activity descriptions for each item relative to the project;
- C. Activity durations by working days or calendar days as appropriate. Note the non-working periods exceeding three days on each activity bar.

Include in the Written Narrative:

- A. The proposed work process sequence showing the interdependence of all major work items required to complete all work items under the Contract, including shop drawing submittal's, permits, fabrication, and delivery activities, etc;
- B. A description of work activities and the progress time of each major work item measured by working day or calendar day as appropriate;
- C. A description of the ASC, work days per week, holidays, number of shifts per day, hours per shift, and resources used.

Submit 2 updated ASC and WN monthly showing current progress and any revisions or modifications to reflect changes in the method or manner of the work, specification changes, extra work, changes in duration, etc.

Prosecute the work with adequate resources to complete the Contract within the time specified.

Obtain all air quality, water quality, and storm water runoff permits, approval of reclamation plans, and archaeological and historical clearances immediately upon the Notice of Award of Contract. Furnish copies of completed applications to secure permits, approvals, or clearances to the Engineer.

The Department will reimburse all reasonable costs incurred in securing the permits, approvals, and clearances if the contract is not executed.

A preconstruction conference will be held on a mutually agreed date between the Contractor, Department, and other parties interested in the work before construction starts. The Contractor's superintendent in charge of the construction must attend the conference. Encourage Subcontractors to attend.

Obtain the Project Manager's written approval before starting night work. Furnish flood lighting to assure accuracy and quality of workmanship. Do not rely only on equipment lights. Night work approval may be rescinded at any time.

Suspending and resuming work on all or any part of the Contract will be by Subsection 105.01.

Work may be suspended for unsuitable weather or for other conditions that are detrimental to the work accuracy and quality. Prevent any damage and correct deteriorated work that was not protected during the suspension period at Contractor expense. A time extension will not be approved for correcting non-protected work.

Store materials to prevent damage and without obstructing or impeding the traveling public.

Do not allow water to pond on the roadway or the construction limits. Open ditches, shoulder drains, and take other actions to protect the work.

Do not suspend work on any part of the Contract without the Engineer's written approval. Time will be charged during unauthorized work suspensions. The Contractor is responsible for all maintenance required during periods of unauthorized suspension and for all work and materials required as a result of the suspension.

Reimburse the Department for all field project engineering charges accrued during any unauthorized work suspension.

**108.04 LIMITATION OF OPERATIONS.** Conduct the work to minimize interfering with traffic and work already started. Finish a section of roadway before starting work on any additional sections if it is essential to public convenience.

**108.05 CHARACTER OF WORKERS.** Provide workers with the skill and experience to perform the work.

Remove any person employed who does not perform work in a proper and skillful manner or who is intemperate or disorderly. Do not re-hire these employees without the Engineer's approval.

Failure to remove the employee or employees or failure to furnish suitable and sufficient personnel to perform the work may result in a written notice to suspend the work.

**108.06 METHODS AND EQUIPMENT.** Use equipment of the size and mechanical condition to perform and produce the specified quality of work. Do not use equipment that damages the roadway, adjacent property, or other highways.

Operate all equipment with adequate lighting at night.

Do not use methods or equipment other than as specified unless requested in writing and authorized by the Engineer. Include in the request a full description of the proposed methods and equipment to be used and the reasons for the change. Produce work meeting the contract requirements.

Discontinue use of alternate methods or equipment if the Engineer determines that the work does not meet contract requirements. Remove and replace or repair deficient work with work of specified quality at Contractor expense. No change will be made regarding payment for authorizing a change in methods or equipment.

**108.07 DETERMINATION OF COMPENSATION AND EXTENSION OF CONTRACT TIME FOR EXCUSABLE, NONCOMPENSABLE AND COMPENSABLE DELAYS.** Time allowed for completion of the Contract is determined by either the "Calendar Date" or the "Working Day" provision in the Contract.

**108.07.1 Calendar Date Contracts.** Complete all work by the fixed calendar date specified in the Contract. The fixed calendar completion date will be extended:

A. If the Contract is awarded more than 10 calendar days after bid opening;

B. For extra work according to the calendar days computed under Subsection 108.07.4;

C. For authorized suspensions of work.

The new completion date is determined by adding the number of calendar days between the tenth day after bid opening and the award date; the calendar days computed under Subsection 108.07.4; or the number of calendar days during authorized suspensions to the specified fixed calendar completion date.

The actual completion date is the date the Engineer accepts the project as complete under Subsection 105.15.2.

Contract time overruns for assessment of liquidated damages will be computed as the number of calendar days elapsing between the contract completion date and the actual completion date.

**108.07.2 Working Day Contracts.** Complete all work within the number of working days specified in the Contract.

A working day is defined in Subsection 101.82. Holidays designated as nonworking days are defined in Subsection 101.36.

Working days will be assessed against the contract time except for days when inclement weather or the aftermath of inclement weather prevents the performance of operations that would be in progress for at least 60% of the normal daily schedule being worked.

Assessment of time begins on the effective date of the Notice to Proceed.

If work cannot be performed at the regular starting time because of inclement weather or the effects of inclement weather and the work crew is dismissed, no time will be charged for that day.

Do not work on holidays or Sundays without the Engineer's approval. Work done on Saturdays, Sundays, and approved holidays will be assessed as working days (except during the period November 16 through April 15 when no time is charged for any work).

Producing and stockpiling surfacing aggregates, pre-wetting, making emergency repairs to the project, and providing protection for the public may be accomplished on Saturdays, Sundays, holidays, and during a work suspension period without assessment of time with the following exception:

The period between November 15 through April 15 is chargeable for State Maintenance Stockpiling Projects.

Assessment of time for all working days begins on the effective date of the Notice to Proceed. Inclement weather and its after effects will be treated the same as provided for above.

Chargeable or nonchargeable working days will be determined and agreed upon daily between the Project Manager and the Contractor's superintendent. Except for the period November 16 through April 15, the Project Manager will furnish a weekly report showing the number of working days:

- A. Charged for the preceding week;
- B. Previously charged;
- C. Specified for contract completion;
- D. Of approved time extensions, except for days covered under Subsection 108.07.4, second paragraph; and
- E. Remaining to complete the Contract.

The report will be furnished every Monday. File a written protest with the Project Manager within ten calendar days of receipt of the weekly report of any alleged discrepancies in the time assessed. Failure to file a protest is conclusive evidence that the time assessed is accepted as correct.

**108.07.3 Delays.** The following delays will be considered for extensions of contract time.

- A. Excusable or Noncompensable Delay.** Contract time allowed for the performance of the work may be extended for delays caused by acts of God, acts of the public enemy, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays not caused by the Contractor's fault or negligence.
- B. Compensable Delay.** Contract time may be extended for delays caused by the Department under Subsection 108.07.5.

**108.07.4 Extensions.** Provide a written request to the Project Manager detailing the reasons for requesting a time extension. A plea that insufficient contract time was specified is not a valid reason for a time extension. If the Department finds that the work was delayed because of conditions beyond the control of and not the fault of the Contractor, the contract time will be extended in the amount justified. The extended time for completion will then be in full force and effect as though it were the original time for completion.

The contract time as awarded is based on the estimated quantities as defined in Subsection 102.05. No decrease in contract time will be made for any decrease in a contract item. The contract time will be increased based on the quantity and difficulty of added work. The minimum time allowed for any additional work is computed by the following formula:

$$\text{Time Extension in Days} = \frac{\text{Total Dollar Amount of Additional Work}}{\text{Total Amount of Contract as Awarded}} \times \text{The Contract Time as Awarded}$$

The computed time extension will be rounded to the nearest whole day. No additional contract time will be allowed for:

- A.** Increases in percentages of asphalt in plant mix materials;
- B.** The addition of anti-stripping additives to bituminous materials;
- C.** The addition of or for increases in hydrated lime or mineral fillers to plant mix materials;
- D.** Increases in traffic control devices;
- E.** Delays for slow delivery of materials from the supplier or fabricator;
- F.** Material deliveries delayed for reasons of late ordering, financial considerations, or other foreseeable and preventable causes within the Contractor's control.

Delays in material deliveries for unusual market condition caused by an industry-wide strike, national disaster, or an area-wide shortage beyond the Contractor's control will be considered as a basis for granting additional time.

Submit written documentation substantiating the reasons for the late delivery or non-availability of materials to the Project Manager. The documentation must be from the original supplier and document the dates the material was ordered by the Contractor and the reason for late delivery or non-availability of the material. Include a statement elaborating on the efforts to obtain materials from alternate suppliers.

**108.07.5 Delay Compensation.** Notify the Project Manager of the request for delay consideration. Keep daily records of all non-salaried labor, material costs, and equipment expenses for all operations affected by the delay.

Maintain a daily record of each operation affected by the delay and the location, by stations, of the affected operations. The Department will maintain daily records of the operations by stations. Each Monday, the two records will be compared. Prepare and submit, each Monday, written reports to the Project Manager containing the following information:

1. Number of days behind schedule;
2. A summation of all operations that have been delayed, or will be delayed;
3. An explanation for compensable delays and how the Department's act or omission delayed each operation;
4. An estimate of the time required to complete the project;
5. An itemization of all extra costs incurred, including:
  - a. Relating the extra costs to the delay and document how they are calculated and measured;
  - b. Identifying all non-salaried project employees for whom costs are being compiled; and
  - c. Summarizing the time charges for equipment, identified by manufacturer's number for which costs are compiled.

Provide the Project Manager a written summation of the comparison of the detailed reports within ten calendar days. Define all disagreements between specific records.

Failure to meet to review the Department's records or to report disagreements between the records is considered the Contractor's acceptance of the records as accurate.

**A. Procedures Following Completion of Work Allegedly Delayed.** Submit a written report to the Project Manager within 15 calendar days of project completion, or phase of work allegedly delayed, containing the following information:

1. A description of the operations delayed and the documentation and explanation of the reason for the delay, including all reports prepared for the Contractor by consultants, if used; and
2. An item by item measurement and explanation of extra costs requested for reimbursement due to the delay.

All costs shown in the report submitted to the Department must be certified by an accountant.

The Engineer will review the submittal and any reports prepared by the Project Manager. The Engineer will provide a written decision to the Contractor within 60 calendar days of receiving the submittal.

In the case of compensable delays, if it is determined that the Department is responsible for delays to the Contractor's operations, the Engineer's written decision

will reflect the nature and extent of any equitable adjustment to the contract as specified in Subsection 109.04.3.

**108.08 FAILURE TO COMPLETE ON TIME.** For each working day or calendar day the Contract remains uncompleted after the specified contract completion time, including approved adjustments, a daily charge will be made against the Contract. This daily charge, determined from Table 108-1 will be deducted from any money due the Contractor. This deduction is for liquidated damages for added Department contract administration costs for failure to complete the work on time.

**TABLE 108-1  
SCHEDULE OF LIQUIDATED DAMAGES**

ORIGINAL CONTRACT AMOUNT		DAILY CHARGE	
From More Than	To and Including	Calendar Day or Fixed Date	Working Day
\$ 0	\$ 25,000	\$ 136	\$ 191
25,000	50,000	229	321
50,000	100,000	320	448
100,000	500,000	617	864
500,000	1,000,000	952	1334
1,000,000	2,000,000	1326	1856
2,000,000	5,000,000	1894	2652
5,000,000	10,000,000	2317	3244
10,000,000	—	2443	3421

Permitting the Contractor to continue and complete the work after the specified contract completion time or approved extensions granted does not waive the Department's rights under the Contract.

The Commission may waive such portions of the liquidated damages as may accrue after the work is in condition for the safe and convenient use by the traveling public.

**108.09 DEFAULT OF CONTRACTOR.** If the Contractor:

- A. Fails to begin the work under the Contract within the time specified in the notice to proceed;
- B. Fails to perform the work with sufficient resources to assure the prompt completion of the work;
- C. Fails to perform the work in accordance with the contract requirements or refuses to remove and replace rejected materials or unacceptable work;
- D. Discontinues the prosecution of the work;

- E. Fails to resume work that has been discontinued within a reasonable time after notice to resume has been given;
- F. Becomes insolvent or is declared bankrupt or commits an act of bankruptcy or insolvency;
- G. Allows a final judgement to remain unsatisfied for a period of 10 days;
- H. Makes an assignment for the benefit of creditors;
- I. Fails to comply with contract requirements regarding minimum wage payments, EEO requirements, or any state or federally mandated affirmative action requirements;
- J. For any other cause fails to carry on the work in an acceptable manner.

The Engineer will give written notice to the Contractor and surety of such delay, neglect, or default. Failure to correct the delay, neglect, or default within 10 calendar days after the Engineer's written notice gives the Department full authority without violating the Contract to take over prosecution of the work from the Contractor. The Department may appropriate or use any or all materials and equipment at the project site that is suitable and acceptable and enter into an agreement for completing the Contract. The Department may use any methods determined necessary to complete the Contract.

All costs and charges incurred by the Department, including the cost of completing the work under the Contract, will be deducted from any monies due or that may become due the Contractor. If the expense exceeds the sum that would have been payable under the Contract, then the Contractor and the surety shall be liable and shall pay to the Department the amount of such excess.

#### **108.10 TERMINATION FOR PUBLIC CONVENIENCE.**

**108.10.1 General.** The Department may terminate the Contract in whole or part, whenever:

- A. Work cannot proceed because of an Executive Order of the President with respect to the prosecution of war or in the interest of national defense; or an Executive Order of the President or Governor of the State with respect to the preservation of energy resources; or
- B. Work cannot proceed because of a preliminary, special, or permanent restraining order of a court of competent jurisdiction where the issuance of such restraining order is primarily caused by acts or omissions of persons or agencies other than the Contractor; or
- C. It is determined that termination is in the best interests of the Department.

**108.10.2 Payment.** Payment will be made for the actual work performed at the contract unit prices for completed items of work when the Contract is terminated under Subsection 108.10.1.

An equitable adjustment for partially completed items of work and disposal of materials will be made under Subsection 109.05.

Submit to the Engineer a claim for termination costs after receipt of the notice of Termination for Public Convenience, under Subsection 108.10.1 (A). Detail the claim as specified in Subsection 105.16.2 so the Engineer can determine the basis and amount of the claim. Submit the claim no later than 60 calendar days from the effective date of termination. Resolution of the claim will be through the established



administrative channels. If the claim cannot be resolved and an agreement reached, appeal the claim under Subsection 105.16.3. Make all records available to verify the claim.

**108.10.3 Responsibility of the Contractor and Surety.** Termination of a contract does not relieve the Contractor of any contractual responsibilities for work nor the Surety or Sureties of the obligations under the contract bond or retainage bond for the work performed.